APPENDIX A

Decision of the Court of Appeals for the Fifth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-1469

D. C. Docket No. EP-75-CA-239

(Filed Oct. 19, 1982)

J. O. TURNER and wife, FERN LOUISE TURNER,
Plaintiffs-Appellees,

v.

ROBERT L. GUMM, d/b/a DESERT-AIRE
MOBILE HOME STYLING AND SALES,
INC., and BOB'S MOBILE
HOME SALES,
Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Texas

Before BROWN, WISDOM and RANDALL,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

August 27, 1982

ISSUED AS MANDATE: Oct. 18, 1982

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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(August 27, 1982)

Before BROWN, WISDOM and RANDALL,
Circuit Judges.

PER CURIAM:

Robert L. Gumm, an El Paso, Texas businessman, d/b/a Bob's Mobile Homes, appeals the District Court's judgment in this Truth-in-Lending case. Unimpressed by the scattershot arguments he advances, we affirm.

I.

A Sticky Deal

J. O. and Fern Louise Turner purchased a mobile home from Gumm on August 30, 1974. Delta Corporation of America (Delta) arranged the financing with Security National Bank of Roswell, New Mexico (SNB). In late October or early November 1974, the Turners signed in blank a retail installment contract and security agreement, a copy of which they introduced in evidence.[1] Gumm assigned the contract to SNB and received a check for $12,118. Under a participation agreement he had with Delta, he also received a fee in connection with the assignment. Gumm had obtained insurance on the mobile home, although the policy included no provision for waiver by the carrier of subrogation rights against the Turners, but did not disclose all the details.

The Turners sued Gumm and Delta on October 31, 1975, asserting a federal claim under the Federal Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.*, and a state claim under the Texas Consumer Credit Code, Vern. Tex. Rev. Civ. Stat. art. 5069-6.01 *et seq.*[2] Gumm in May

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1. Even the legitimacy of this copy of the contract comes under attack. Gumm argues that he never signed it. Yet it bears a signature purporting to be his, and on the reverse side he has assigned it to SNB. He does not deny the assignment. We accept this copy as authoritative for present purposes.

2. 15 U.S.C. § 1605 provides:

Determination of finance charge
Definition

(a) Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not

1976 sought to join SNB as a party, but the special

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include charges of a type payable in a comparable cash transaction. Examples of charges which are included in the finance charge include any of the following types of charges which are applicable:

* * *

(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.

* * *

Property damage and liability insurance premiums included in finance charge.

(c) Charges or premiums for insurance, written in connection with any consumer credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, shall be included in the finance charge unless a clear and specific statement in writing is furnished by the creditor to the person to whom the credit is extended, setting forth the cost of the insurance if obtained from or through the creditor, and stating that the person to whom the credit is extended may choose the person through which the insurance is to be obtained.

Tex. Rev. Civ. Stat. Ann. Art. 5069-6.04(3) provides:

When insurance is required in connection with such a contract or agreement made under this Chapter, the seller or holder shall furnish the buyer a statement which shall clearly and conspicuously state that insurance is requested or required in connection with the contract, and that the buyer shall have the option of furnishing the required insurance either through existing policies of insurance owned or controlled by him or of procuring and furnishing equivalent insurance coverages through any insurance company authorized to transact business in Texas. In addition when any requestsed or required insurance is sold or procured by the seller or holder at a premium or rate of charge not fixed or approved by the State Board of Insurance, the seller or holder shall include such fact in the foregoing statement, and the buyer shall have the option for a period of five days from the date of the contract or agreement of furnishing the required insurance coverage either through existing policies of insurance owned or controlled by him or of procuring and furnishing equivalent insurance coverage through any insurance company authorized to transact business in Texas. Such statement or statements may be made in conjunction with or as part of the retail installment contract required by Article 6.02 or the retail charge agreement required by Article 6.03, respectively.

And Article 5069-6.04(b) states:

The contract or agreement must state the kind, coverage, term and amount of premium for such insurance.

master[3] denied the motion. In January 1978, after settling with Delta, the Turners amended their complaint and moved to dismiss Delta. The master took no action on the motion. In May, four months later, Gumm, without requesting leave to file, cross-claimed against Delta. The special master belatedly dismissed Delta. Gumm did not object.

On January 3, 1981, Gumm requested a jury trial. The District Court did not respond but commenced trial without a jury on February 27, 1981.

The Court, in its Findings of Fact and Conclusions of Law, held Gumm liable for violation of 15 U.S.C. § 1605 in failing to disclose the cost of insurance. Invoking pendent jurisdiction over the state claim, it also found Gumm liable for such violations under the Texas Consumer Credit Code. It awarded the Turners $26,563.68 in damages.[4]

II.

Gumm launches a barrage of attacks against the District Court's findings, some proper, some not. The only point he does not make is a defense on the merits. So far as we can discern, Gumm no longer denies that he

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3. Since neither party explained the appointment of the special master, we *sua sponte* requested letter briefs on the subject. It appears that at that time the Western District of Texas routinely referred all Truth-in-Lending cases to a special master. He conducted the pretrial matters without, it seems, any objection from either party. The Court subsequently countermanded this order and took these cases back. Trial was had before the District Court.

4. The sum comprised the statutory limit for the federal violation ($1,000), twice the "interest or time price differential" under Texas law ($16,203.68), and attorney's fees ($9360).

violated the consumer statutes but now seeks to overturn the judgment on "policy" grounds.[5]

Without citing F.R.Civ.P. 19, Gumm alleges that the Court erred in not holding SNB to be an indispensable party. SNB has no interest in this lawsuit. Whatever Gumm's rights as against SNB, if any, his allegations raise no issue as to joinder.

Making much the same "policy" argument, Gumm protests the special master's dismissal of Delta. After the Turners voluntarily dismissed their claim against Delta, Gumm, without seeking leave of court, cross-claimed against it. The special master properly struck the cross-claim, and Gumm did not object. Nor did he raise the point at trial. That failure to object waives the argument here.

While the right to jury trial "shall be preserved to the parties inviolate", F.R.Civ.P. 36(b) requires the demand for jury trial "not later than 10 days after the service of the last pleading directed to such issue." Gumm served his request within 10 days of his response to Turner's motion for summary judgment, but well after the initial pleadings—complaint and answer—had been filed. F.R. Civ.P. 7(a) excludes such motions and responsive papers from the definition of pleadings. Since he did not timely file for a jury trial within 10 days of the initial pleadings, Gumm cannot assert the mandatory right here. McCorstin v. U.S. Department of Labor, 630 F.2d 242 (5th Cir. 1980), *cert. denied,* 450 U.S. 999, 101 S.Ct. 1705, 68 L.Ed.2d 201 (1981). *See generally* 9 C. Wright & A. Miller, Federal Practice & Procedure § 2320 (1971).

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5. Gumm protests that he is a poor small businessman and that the Turners should sue SNB and Delta, the big corporations, instead.

That SNB or Delta are "creditors" does not mean, as Gumm would have us to believe, that he is not a "creditor." 15 U.S.C. § 1602(f) defines a creditor as one who both "regularly extends . . . consumer credit which is payable by agreement in more than four installments [and] to whom the debt arising from the consumer credit transaction is initially payable." Whether or not the others fall within this definition, Gumm certainly does.

Gumm finally complains that the Turners obtain a "double recovery" by virtue of the overlap of the federal and Texas consumer protection claims. We have held that such dual recovery is permissible, Smith v. Chapman, 614 F.2d 968, 977-78 (5th Cir. 1980), at least prior to the 1977 amendment to the state Act. While such liberality may prove a boon to a plaintiff, it comports with the remedial purposes of these statutes.

Gumm protests the District Court's award of attorney's fees. Mindful of Judge Rubin's admonition that "[t]he Truth in Lending Act was not intended to be an endowment for lawyers", McGowan v. King, 661 F.2d 48, 52 (5th Cir. 1981), we find that the District Court did not stray from the path of reason. The Judge took into account the experience of the Turners' lawyers, the number of hours they worked, the difficulty of understanding Gumm's defenses, and the reasonable hourly charge in El Paso, Texas for comparable representation. These factors are among those we enumerated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The Judge did not abuse his discretion.

Most of Gumm's remaining complaints center on the District Judge's factual findings. After reviewing them, we see no basis, under the guiding hand of F.R.Civ.P.

52(a), to reverse but defer to Judge Hudspeth who heard the testimony, observed the witnesses' demeanor, studied the exhibits, and suffered through the trial. Gumm's remaining claims have no merit, and we decline to address them.

AFFIRMED.

APPENDIX B

Judgment of District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

EP-75-CA-239

(Filed July 29, 1981)

J. O. TURNER and wife, FERN LOUISE TURNER,
Plaintiffs,

v.

ROBERT L. GUMM and DESERT AIRE MOBILE HOME STYLING AND SALES, INC., individually and d/b/a BOB'S MOBILE HOMES,
Defendant.

JUDGMENT

On the 26th day of February, 1981, the above cause came on for trial before the Court without a jury. The Court, having considered the testimony, the exhibits, and the arguments of counsel, finds that judgment should be entered in accordance with the findings of fact and conclusions of law this day filed.

It is therefore ORDERED, ADJUDGED and DECREED that the Plaintiffs J. O. Turner and Fern Louise Turner have judgment against the Defendant Robert L. Gumm, individually and d/b/a Bob's Mobile Home Sales, in the amount of TWENTY-SIX THOUSAND FIVE HUNDRED SIXTY-THREE AND 68/100 ($26,563.68)

DOLLARS, plus interest at the legal rate from the date of judgment until paid, plus costs of court, for all of which let execution issue.

SIGNED AND ENTERED this 29th day of July, 1981.

/s/ HARRY LEE HUDSPETH
Harry Lee Hudspeth
United States District Judge

APPENDIX C

District Court Findings of Fact and Conclusions of Law

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

EP-75-CA-239

(Filed July 29, 1981)

J. O. TURNER and wife, FERN LOUISE TURNER,
Plaintiffs,

v.

ROBERT L. GUMM and DESERT AIRE MOBILE HOME STYLING AND SALES, INC., individually and d/b/a BOB'S MOBILE HOMES,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are hereby entered in the above case.

A. *Findings of Fact.*

1. The Plaintiffs bring this suit under the Federal Truth-in-Lending Act, 15 U.S.C. § 1640(e), and the Texas Consumer Credit Code, Art. 5069 - 6.01 *et seq.*, Tex. Rev. Civ. Stat. Ann. Jurisdiction is based upon 28 U.S.C. § 1337, with respect to the federal claim, and upon the doctrine of pendent jurisdiction with respect to the claim under state law.

2. Plaintiffs J. O. and Fern Louise Turner are residents of Dell City, Texas. At the time of the transaction which gives rise to this suit, they lived in Happy, Texas. Defend- and Robert L. Gumm is an individual doing business in El Paso, Texas, under the trade names Bob's Mobile Home Sales and Desert Aire Mobile Home Styling and Sales, Inc.

3. At all times pertinent to this suit, the Defendant was a retail seller of mobile homes who regularly entered into security agreements and retail installment contracts containing terms providing for credit payable by arrangement in more than four installments, and for which the payment of a finance charge is required.

4. On August 30, 1974, in El Paso, Texas, Plaintiffs purchased from Defendant a 1973 Monte Carlo mobile home, including furniture and equipment. The selling price was $13,520.00, with a down payment of $1,500.00 and the remainder financed. This mobile home was purchased as a residence for Plaintiffs, not for business use.

5. Delta Corporation of America was a mobile home service company that arranged for the purchase of retail installment sales contracts by lending institutions. Bob King, an employee of Delta, advised the Defendant that Mutual Savings of Las Cruces, a New Mexico lending institution, had approved the financing of the Monte Carlo mobile home, and that it should be delivered to the Plaintiffs. The Defendant did deliver the mobile home to Plaintiffs at Dell City, Texas, some 100 miles east of El Paso in Hudspeth County. Then, for reasons never clearly explained in the record, the expected financing at Mutual Savings of Las Cruces fell through. King then attempted to place the financing of the mobile home with another lending institution in New Mexico.

6. On or about October 29, 1974, King notified Plaintiffs and Defendant that the Security National Bank of Roswell, New Mexico had agreed to handle the contract. King came to Plaintiffs' home in Dell City and obtained their signatures on a blank retail installment contract and security agreement, dated November 1, 1974, which is the subject of this suit. Plaintiffs later received a completed copy of the installment contract (Pl. Ex. 6) through the mail. A Texas Certificate of Title to the mobile home was issued on November 20, 1974 (Pl. Ex. 3).

7. Defendant assigned the retail installment contract to the Roswell bank and received a check for $12,118.00 (Pl. Ex. 7). Plaintiffs began making monthly payments to the Roswell bank.

8. Defendant made no disclosures to the Plaintiffs other than those contained in the retail installment contract (Pl. Ex. 6).

9. Under the Defendant's arrangement with Delta Corporation, he was to receive a participation fee from Delta in connection with the assignment of the retail installment contract to the Security National Bank of Roswell. Defendant claims that he did not in fact receive a participation fee in connection with this transaction.

10. In connection with this sale, the Defendant obtained a policy of comprehensive physical damage insurance on the Plaintiffs' mobile home through the Foremost County Mutual Insurance Company (Pl. Ex. 2). The insurance policy included Vendor's Single Interest protection. No provision was made for the waiver by the carrier of subrogation rights against the Plaintiffs.

11. The Plaintiffs received in the mail a completed copy of the contract (Pl. Ex. 6). Defendant denied that this was the contract he signed, and produced his own copy of the retail installment contract (Pl. Ex. 9). He concedes that he did sign a document styled "Security National Bank of Roswell, New Mexico Security Agreement and Retail Installment Contract."

B. *Conclusions of Law.*

1. This Court has jurisdiction over the subject matter and the parties. Federal Truth-in-Lending Act, 15 U.S.C. § 1640(e) and 28 U.S.C. § 1337.

2. The transaction in question is also subject to the Texas Consumer Credit Code, Tex. Rev. Civ. Stat. Ann., Art. 5069 - 6.01 *et seq.* in that the contract was entered into in Texas. Art. 5069 - 6.01 has been interpreted to cover mobile homes not used to transport persons or property on a public highway. *Yates v. Mobile America Sales Corporation,* 591 S.W.2d 453 (1979).

3. This Court has pendent jurisdiction over the claim brought under the Texas Consumer Credit Code. Plaintiffs' claims under federal and state law arise under a "common nucleus of operative facts," and the Plaintiffs would ordinarily be expected to try all of the claims in one judicial proceeding. *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966). The reasons for exercising pendent jurisdiction are strong where, as in this case, the state claims implicate federal policy. *Hagans v. Levine,* 415 U.S. 528, 550 (1974).

4. The transaction entered into by Plaintiffs and the Defendant was a "consumer credit transaction" as defined by 15 U.S.C. § 1602(h), and was not an "exempted

transaction" as defined by 15 U.S.C. § 1603. The transaction involved "credit" within the meaning of 12 C.F.R. § 226.2(q); and because it was for personal, household, and family purposes, it constituted "consumer credit" within the meaning of 12 C.F.R. § 226.2(p).

5. The Defendant was a "creditor" as defined by 15 U.S.C. § 1602(f) and 12 C.F.R. § 226.2(s), in that he regularly arranged for the extension of credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required. "Arranging for the extension of credit" occurs when the person providing or offering to provide consumer credit receives or will receive a fee, compensation, or other consideration, or he has knowledge of the credit terms and participates in the preparation of the contract documents required for the extension of credit. 12 C.F.R. § 226.2(h). Here, the Defendant arranged for the extension of credit in that he anticipated receiving a participation fee from the agency (i.e. Delta) that secured the financing with the lending institution.

6. Since the credit extended was not "open end credit," the disclosure applicable to the extension of "credit other than open end" are applicable to this case. See 12 C.F.R. §§ 226.8(a), (b), and (c).

7. The Defendant violated the Truth-in-Lending Act in each of the following respects:

(a) By failing to include the cost of comprehensive physical damage insurance coverage in the finance charge as required by 15 U.S.C. § 1605 and § 226.4(a)(6) of Regulation Z. The insurance cost was made a part of the contract, but it was included in the "amount financed" rather than the "finance charge." Also, no clear and speci-

fic statement was furnished by the seller stating that the buyer could choose the person through whom the insurance was to be obtained.

(b) By failing to include the cost of Vendor's Single Interest insurance coverage in the finance charge as required by § 226.4(a)(b) and Interpretation § 226.404 where, as here, the insurance company did not waive its subrogation rights. In this instance also, the insurance cost was included in the "amount financed" and not the "finance charge."

8. The retail installment contract entered into by Plaintiffs and Defendant was a "retail installment transaction" as defined by the Texas Consumer Credit Code. Art. 5069 - 6.01(e), Tex. Rev. Civ. Stat. Ann.

9. Plaintiffs were "retail buyers" as defined by the Texas Consumer Credit Code. Art. 5069 - 6.01(c), Tex. Rev. Civ. Stat. Ann.

10. The Defendant was a "retail seller" as defined by The Texas Consumer Credit Code. Art. 5069 - 6.01(d), Tex. Rev. Civ. Stat. Ann.

11. The Defendant violated the Texas Consumer Credit Code in each of the following respects:

(a) By failing to deliver to the retail buyers, or mailing to them at their address shown on the retail installment contract, a copy of the contract as accepted by the seller, in violation of Tex. Rev. Civ. Stat. Ann., Art. 5069 - 6.02(3). No evidence was produced to show that Plaintiffs received a copy of the contract that was signed by the Defendant.

(b) By failing to clearly and conspicuously disclose that the comprehensive physical damage insurance

was required in connection with said transaction, in violation of Tex. Rev. Civ. Stat. Ann., Art. 5069 - 6.04(3) and (5). A reference to "auto physical damage insurance" does not comply with the statute.

(c) By failing to disclose that the comprehensive physical damage insurance was sold at rates neither fixed nor approved by the State Board of Insurance, as required by Tex. Rev. Civ. Stat. Ann., Art. 5069 - 6.04(3) and (5). The evidence showed that the insurance was purchased from a county mutual insurance company, the rates of which are not regulated by the State Board of Insurance.

(d) By failing to disclose the cost of comprehensive physical damage insurance, as required by Tex. Rev. Civ. Stat. Ann., Art. 5069 - 6.04(3) and (5).

(e) By failing to disclose that the Vendor's Single Interest insurance coverage was required in connection with said transaction, in violation of Tex. Rev. Civ. Stat. Ann., Art. 5069 - 6.04(3) and (5).

(f) By providing for the waiver of any claim based upon any unwritten modification of any of the terms or the conditions of the contract. Art. 5069 - 6.05 (6), Tex. Rev. Civ. Stat. Ann., prohibits a provision that the buyer agrees not to assert against the seller any claim or defense arising out of the sale.

(g) By providing for the waiver of any claim under the laws of the State of Texas, in violation of Tex. Rev. Civ. Stat. Ann., Art. 5069 - 6.05(6). The contract provides: "This contract shall be governed by the laws of the State of New Mexico."

12. The violations of the Federal Truth-in-Lending Act and the Texas Consumer Credit Code were material.

Misleading disclosures can be as much a violation of these Acts as the failure to disclose. Strict compliance with the technical requirements of the Federal Truth-in-Lending Act is to be observed. *Smith v. Chapman,* 614 F.2d 968 (5th Cir. 1980).

13. Under the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.*, the Defendant is liable in statutory damages to the Plaintiffs for an amount equal to double the finance charge, but not to exceed the sum of $1,000.00. 15 U.S.C. § 1640(a)(1). In this case, Defendant is liable to Plaintiffs in the maximum sum of $1,000.00.

14. The liability under the Texas Consumer Credit Code for the instant violations is governed by Tex. Rev. Civ. Stat. Ann., Art. 5069 - 8.01, as it existed prior to a 1977 amendment. It provided for a civil penalty equal to twice the amount of interest or time price differential. In this case, that amount would be $16,203.68.

15. The damages to which Plaintiffs are entitled must be based upon the law that existed when this cause of action arose. Prior to the August 1977 amendment of Art. 5069 - 8.01, Plaintiffs could recover under *both* the Federal Truth-in-Lending Act and Art. 5069 - 8.01. *Cantrell v. First National Bank of Euless,* 560 S.W.2d 721, 729-730 (Tex. Civ. App.—Ft. Worth 1977, writ ref'd n.r.e.). The savings clause to the 1977 amendments exempts Chapter 6 actions pending on August 31, 1977. Section 3 of S.B. 939 (1977). Therefore, Plaintiffs are entitled to recover under both the Federal Truth-in-Lending Act and the Texas Consumer Credit Code. Plaintiffs are entitled to a judgment against the Defendant in the sum of $17,203.68.

16. Both the Federal Truth-in-Lending Act and the Texas Consumer Credit Code allow Plaintiffs to recover reasonable attorneys' fees in the case of any successful actions to enforce the Acts' provisions. 15 U.S.C. § 1640 (a)(2); Tex. Rev. Civ. Stat. Ann., Art. 5069 - 8.01.

17. Plaintiffs were represented in this case by Robert Tinnell and Michael Crowley. At the time of the trial, Mr. Tinnell had practiced law for 18 years and Mr. Crowley for five and a half years. Both have substantial experience and expertise in Truth-in-Lending cases and related litigation. Mr. Tinnell had expended 92 hours in the preparation and trial of this case, and Mr. Crowley, 64 hours. A reasonable fee in El Paso County, Texas, for attorneys of their skill and experience in this type of litigation is $60.00 an hour. Therefore, Mr. Tinnell is entitled to an attorney's fee of $5,520.00, and Mr. Crowley to a fee of $3,840.00, which will reasonably compensate them for their services through the trial of this cause. Should an appeal be taken, and should Plaintiffs prevail on such appeal, the Court will consider affidavits or further testimony regarding a reasonable fee for the additional legal services rendered to Plaintiffs by their attorneys on appeal.

18. Plaintiffs are entitled to a judgment against Defendant in the amount of $26,563.68, and to recover their costs.

SIGNED AND ENTERED this 29th day of July, 1981.

/s/ HARRY LEE HUDSPETH
Harry Lee Hudspeth
United States District Judge